

OCT 5 1993

OFFICE OF THE CLERK

No. 93-284

In The
Supreme Court of the United States
October Term, 1993

SECURITY SERVICES, INC.,

Petitioner,

v.

K MART CORPORATION,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

RESPONDENT'S SUPPLEMENTAL
REPLY IN OPPOSITION

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Since the filing of K Mart's Reply in Opposition to Security Services' Petition For Writ of Certiorari, this Court has denied a Petition for Certiorari in *F.P. Corp. v. Twin Modal, Inc.*, 989 F.2d 285 (8th Cir. 1993), *cert. denied*, No. 92-2062 (Oct. 4, 1993). That decision arrived at the same result as the instant case (i.e., a non-participating carrier's use of the Household Goods Carriers Bureau Mileage Guide Tariff to compute undercharges violates the filed rate doctrine).

A different result was reached by the D.C. Circuit and the Seventh Circuit Courts of Appeals in *Overland Express, Inc. v. Interstate Commerce Commission*, 996 F.2d

356 (D.C. Cir. 1993), *reh'g denied*, (D.C. Cir. Sept. 22, 1993), *rev'g sub nom., Jasper Wyman & Son, et al. - Petition for Declaratory Order - Certain Rates and Practices of Overland Express, Inc.*, No. 40510, 8 I.C.C.2d 245 (1992) (See **Appendix A** for order denying rehearing); *Brizendine v. Cotter & Co.*, ___ F.2d ___, 1993 WL 292348 (7th Cir. 1993), *reh'g denied*, (7th Cir. Sept. 21, 1993) (See **Appendix B** for order denying rehearing). Petitions for *certiorari* will be filed in the latter cases. See **Appendix C** (Press Release from Interstate Commerce Commission in *Overland Express*).

In light of multiplicity of appeals on the identical issue, Respondent suggests that this Court grant *certiorari* only in *Overland Express*, since it is the first case in which a Circuit Court of Appeals disagreed with the majority view and overturned the I.C.C. decision upon which all of the previous cases were founded. (*Jasper Wyman & Son, et al.*) All other petitions for *certiorari* should be stayed pending this Court's disposition of *Overland Express*, and should be consolidated if *certiorari* is granted. See **Appendix D** listing cases before this Court and the Circuit Courts of Appeals involving the Household Goods Carrier Mileage Guide Tariff issue.

Respectfully submitted,

WILLIAM J. AUGELLO

October 4, 1993

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1037

September Term, 1992

Overland Express, Inc.,

Petitioner

v.

Interstate Commerce Commission,

Respondent

BEFORE: Edwards and Silberman, Circuit Judges

ORDER

(Filed Sept. 22, 1993)

Upon consideration of respondents' petition for rehearing, filed August 6, 1993, and of the responses thereto, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:

RON GARVIN, CLERK

BY: /s/ Robert A. Bonner

Robert A. Bonner

Deputy Clerk

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1037

September Term, 1992

Overland Express, Inc.,

Petitioner

v.

Interstate Commerce Commission,

Respondent

BEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

(Filed Sept. 22, 1993)

Respondents' Suggestion For Rehearing *En Banc* and the responses thereto have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:

RON GARVIN, CLERK

BY: /s/ Robert A. Bonner

Robert A. Bonner

Deputy Clerk

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UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 92-1037

September Term, 1992

Overland Express, Inc.,

Petitioner

v.

Interstate Commerce Commission,

Respondent

BEFORE: Mikva, Chief Judge; Wald, Edwards, Silberman, Buckley, Williams, D. H. Ginsburg, Sentelle, Henderson, and Randolph, Circuit Judges

ORDER

(Filed Sept. 22, 1993)

Upon consideration of Amici Curiae's Petition for Waiver of Local Rule 15(a)(7), it is

ORDERED, by the Court, *en banc*, that the petition is granted and the Clerk is directed to file the lodged response of amici curiae.

Per Curiam

FOR THE COURT:

RON GARVIN, CLERK

BY: /s/ Robert A. Bonner

Robert A. Bonner

Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

September 21, 1993

HON. JOEL M. FLAUM, Circuit Judge

HON. DANIEL A. MANION, Circuit Judge

HON. ILANA D. ROVNER, Circuit Judge

ROBERT E. BRIZENDINE,	]	Appeal from the
Trustee on behalf of the	]	United States
Bankruptcy Estate of Brown	]	District Court for
Transport Truckload, Inc., Brown	]	the Northern
Transport Corp., and Thurston	]	District of
Motor Lines, Inc.	]	Illinois, Eastern
Plaintiff-Appellant.	]	Division.
	]	No. 91 C 6761
v.]	
	]	Milton I. Shadur,
No. 92-2925	]	Judge.
COTTER & COMPANY,]	
Defendant-Appellee.]	

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause on August 30, 1993, by defendant-appellee, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

APPENDIX C

INTERSTATE COMMERCE COMMISSION
ICC NEWS

12th & Constitution Avenue N.W. □ Washington D.C.
20423

FOR RELEASE

Tuesday, September 28, 1993

No. 93-257

Contact: Dennis Watson

(202) 927-5350

TDD (202) 927-5721

ICC TO SEEK SUPREME COURT REVIEW IN
OVERLAND CASE OF EFFECT OF AGENCY'S "VOID-
FOR-NONPARTICIPATION" TARIFF RULE

Interstate Commerce Commission Chairman Gail C. McDonald announced today that the Commission has unanimously decided to file a petition for writ of *certiorari* seeking Supreme Court review of *Overland Express, Inc. v. ICC*, 996 F.2d 356 (D.C. Cir. 1993), *reh'g denied* (Sept. 22, 1993) and to ask the Solicitor General to join with the Commission in filing the petition. In *Overland* the court ruled that the Commission exceeded its statutory authority to retroactively reject a tariff the Commission had accepted for filing in finding that the effect of a pre-existing Commission tariff rule rendered Overland's mileage rates void as a matter of law and, hence, not usable as a basis for attempts to collect undercharges. Overland had failed to participate in the agency tariff upon which it purported to rely for the distance portion of its mileage rates.

Two other appellate courts have sided with the D.C. Circuit in declining to give effect to the "void-for-nonparticipation" tariff rule. See *Robert E. Brizendine, Trustee on Behalf of the Bankruptcy Estate of Brown Transport Truckload,*

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Inc., Brown Transport Corp., and Thurston Motor Lines, Inc. v. Cotter & Company, No. 92-2925 (7th Cir. Aug. 5, 1993) and *Security Services, Inc. f/k/a Riss International Corp. v. P-Y Transportation, Inc. f/k/a C.T.S. Brokerage, Inc.*, No. 92-3992 (6th Cir. Aug. 30, 1993). Three appellate courts have affirmed application of the Commission's tariff rule. See *Freightcor Services, Inc. v. Vitro Packaging, Inc.*, 969 F.2d 1563 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 979 (1993); *F.P. Corp. v. Twin Modal, Inc.*, 989 F.2d 285 (8th Cir. 1993); and *Security Services, Inc. v. K Mart Corp.*, 996 F.2d 1516 (3d Cir. 1993). Petitions for writ of *certiorari* are already pending in the latter two cases.

The Commission decision under review in the *Overland* case is *Jasper Wyman & Son et al. - Pet. for Declaratory Order*, 8 I.C.C.2d 246 (1992).

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APPENDIX D

LIST OF CASES INVOLVING HOUSEHOLD GOODS
CARRIER BUREAU MILEAGE GUIDE TARIFF ISSUE

CASES UPHOLDING THE I.C.C.'S REGULATIONS
WHERE A PETITION FOR CERTIORARI FILED

Freightcor Services, Inc. v. Vitro Packaging, Inc., 969 F.2d 1563 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 979 (Jan. 11, 1993)

F.P. Corp. v. Twin Modal, Inc., 989 F.2d 285 (8th Cir. 1993), *petition for cert. filed*, 62 U.S.L.W. 5 d67 (U.S. July 24, 1993), *cert. denied*, (U.S. Oct. 4, 1993) (No. 92-2062)

Security Services, Inc. v. K Mart Corporation, 996 F.2d 1516 (3rd Cir. 1993), *petition for cert. docketed*, No. 93-284

CASES REJECTING THE I.C.C.'S REGULATIONS
WHERE A PETITION FOR CERTIORARI IS EXPECTED
TO BE FILED

Brizendine v. Cotter & Co., ___ F.2d ___, 1993 WL 292348 (7th Cir. 1993), *reh'g denied* (7th Cir. Sept. 21, 1993)

Overland Express, Inc. v. Interstate Commerce Commission, 996 F.2d 356 (D.C. Cir. 1993), *reh'g denied* (D.C. Cir. Sept. 22, 1993)

CASES PENDING BEFORE THE CIRCUIT COURTS OF
APPEALS

First Circuit

Grove v. Malden Mills Industries, et al., 821 F. Supp. 32 (D. Me. 1993), *appeal docketed*, No. 93-1556 (1st Cir.)

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Third Circuit

Country Wide Truck Service, Inc. v. Wetherill Associates, Inc., Civ. No. 93-359, 1993 WL 210555 (E.D. Pa., June 3, 1993), *appeal docketed*, No. 93-1593 (3rd Cir.) {Unreported}

Fourth Circuit

F.P. Corp. v. Golden West Foods, Inc., 807 F. Supp. 1228 (W.D. Va. July 28, 1992), *appeal docketed*, No. 92-2000(L) (4th Cir.)

Sixth Circuit

Security Services, Inc. v. Dubois Chemical, Inc., 817 F. Supp. 677 (S.D. Ohio, Mar. 19, 1993) (*appeal filed*)

Security Services, Inc. f/k/a Riss International Corp. v. P-Y Transportation, Inc., f/k/a C.T.S. Brokerage, Inc., ___ F.2d ___, 1993 WL 325719 (6th Cir. 1993), *pet. for reh'g filed*, No. 92-3992 (6th Cir. Sept. 10, 1993)

Seventh Circuit

Security Services, Inc. f/k/a Riss International Corp. v. Chemrex, Inc., No. 92 C 4214, 1993 WL 189865, 1993 Fed. Carr. Cas. (CCH) ¶ 83,849 (N.D. Ill. June 2, 1993), *appeal docketed*, No. 93-2632 (7th Cir.) {Unreported}

Ninth Circuit

In re: Columbia Navigation, Inc. v. Teton West Lumber Sales, 1992 Fed. Carr. Cas. (CCH) ¶ 83,785 No. 89-30176-JLP (D. Mont. July 28, 1992), *appeal filed*, No. 92-36680 (9th Cir.)

Convaire International, Inc. v. NTI, Inc., CV 92-1283-PA (D. Ore., Apr. 6, 1993) (*appeal filed*)

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Security Services, Inc. v. All Freight Services, Inc., 1992 Fed. Carr. Cas. (CCH) ¶ 83,788 (S.D. Cal. May 4, 1992), *appeal filed*, No. 92-55785 (9th Cir.)

Eleventh Circuit

Pope v. Amoco Fabrics & Fibers Co., 1992 Fed. Carr. Cas. (CCH) ¶ 37,960 (N.D. Ala. 1992), *appeal docketed*, No. 92-6877 (11th Cir.)

Brizendine v. Kumho, U.S.A., Inc., 1992 Fed. Carr. Cas. (CCH) ¶ 83,779 (Bankr. N.D. Ga. July 1, 1992), *rev'd*, Civ. No. 1:92-CV-2193-GET (N.D. Ga., Sept. 8, 1993) (*appeal filed*)
